Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers	)	WT Docket No. 05-265
	)	

SPRINT NEXTEL COMMENTS

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Summary

In response to the FCC's request for information and comment regarding roaming issues, Sprint Nextel submits the attached comments and economic analysis for the Commission's consideration. The economic analysis was prepared by Dr. Gregory L. Rosston of Stanford University and formerly the FCC's Deputy Chief Economist.

Sprint Nextel and Dr. Rosston agree that promulgating a new regulation governing roaming agreements between wireless carriers would not be in the public interest. Indeed, such a rule could lead to increased prices, reduced investment, and substantial harm to consumers.

Economic analysis of the wireless industry shows that the competitive market has worked extremely well for American consumers. Competition has led to decreasing prices, new services and increased buildout and network coverage, all of which benefit consumers. Vigorous competition has also reduced roaming prices, which also has benefited consumers, but has impacted certain carriers.

These price declines have come about in a largely unregulated environment that has encouraged competition. In particular, the FCC designed and used spectrum allocation methods that ensured a competitive market for wireless services and allowed companies to negotiate roaming agreements among themselves. As Dr. Rosston concludes, there is no evidence of market failure in the wireless market.

Moreover, existing FCC rules already provide a remedy for any alleged anticompetitive conduct. Any party that believes it has been subject to unreasonable or unjust roaming practices is free to file a Section 208 complaint at the FCC. This remedy allows the FCC to apply specific facts to specific situations rather than impose an overly-broad mandate based on unsupported allegations.

In sum, given the highly competitive nature of the industry, the dramatic downward trend in prices and upward trend in coverage and subscribers, the lack of market failure and an already existing remedy, the Commission should not adopt a roaming rule.

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Sprint Nextel Corporation submits these comments in response to the *Notice of Proposed Rulemaking*, which the Commission commenced to determine "whether there is a need for a regulatory regime for roaming service."[1]

With its comments, Sprint Nextel attaches an economic analysis prepared by Gregory L. Rosston, Deputy Director of the Stanford Institute for Economic Policy Research at Stanford University and a former Deputy Chief Economist at the Commission.[2] According to Dr. Rosston, "Economic analysis of the wireless industry shows that the competitive market has worked

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1 *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Notice of Proposed Rulemaking*, FCC 05-160, 20 FCC Rcd 15047, at ¶ 1 (Aug. 31, 2005)("*2005 Roaming NPRM*"). *See also* Separate Statement of Commissioner Copps ("Today we begin to explore . . . whether more rules are needed for roaming.").

2 *See* Gregory L. Rosston, *An Economic Analysis of How Competition Has Reduced High Roaming Charges* (Nov. 2005) ("Rosston Economic Analysis"). Dr. Rosston obtained his M.A. and Ph.D. in economics from Stanford University, and his Ph.D. dissertation studied the effects of FCC policy on the land mobile radio industry. He worked at the FCC between 1994 and 1997, serving as Deputy Chief Economist, Senior Economist in the Office of Plans and Policy, and Acting Chief Economist of the Common Carrier Bureau. During his FCC service, Dr. Rosston worked on spectrum policy, helped to design and implement the agency's spectrum auction program, and oversaw work on a variety of other competition issues. He also co-authored the FCC White Paper, "Using Market Based Spectrum Policy to Promote the Public Interest," setting forth a comprehensive analysis of how market-based spectrum policy promotes the public interest. Dr. Rosston's curriculum vitae is attached to his paper.

extremely well for American consumers and that a new roaming mandate would not be in the public interest":

> CMRS prices – including roaming prices – have dropped substantially without a roaming rule over the past ten years and no demonstrated market failure justifies imposing a new rule.[3]

I. INTRODUCTION

Automatic roaming is a capability a wireless carrier may offer its customers in order to provide service in areas where it has no network coverage.[4] Automatic roaming requires a pre-existing contractual arrangement between the "home" and "roamed-on" (or "host") carrier, a roaming customer using a handset compatible with the air interface utilized by the host network,[5] and a network technology that facilitates multi-carrier roaming.[6] While the Commission has not regulated roaming directly, specifically declining to adopt special rules in 1996 and 2000, it has regulated roaming indirectly by entertaining Section 208 complaints from carriers that believe they are unable to secure roaming contracts on reasonable terms.

Adoption of a new roaming rule would contradict Congress' directive that the Commission "*promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers."[7] The Commission has long recog-

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[3] *Id.* at ¶ 3.

[4] Because automatic roaming has become so prevalent, Sprint Nextel does not discuss manual roaming in these comments and its references to roaming herein refer to automatic roaming only.

[5] *See 2005 Roaming NPRM* at ¶¶ 2-3.

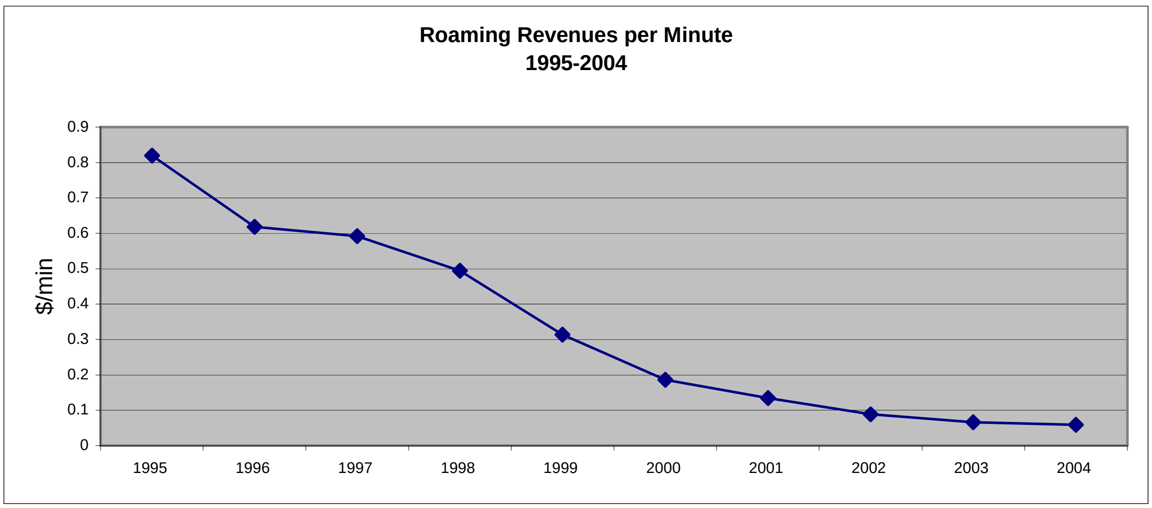
[6] As the FCC is aware, the handful of operators using the iDEN air interface face unique technical challenges in supporting multi-carrier roaming.

[7] Preamble, Telecommunications Act of 1996, Public Law 104-104, 100 Stat. 56 (1996) (emphasis added).

nized that "[m]arket forces – not regulation – should shape the developing CMRS marketplace,"[8] and it has repeatedly refused to adopt automatic roaming rules in the past.

In his analysis, Dr. Rosston confirms that "roaming charges have decreased substantially" and that CTIA data indicate "a reduction of more than a factor of ten":[9]

Figure 2



Source: CTIA'S Wireless Industry Indices, Semi-Annual Data Survey Results, Year-end 2004 Results, Released June 2005, Tables 35 and 111.

Indeed, the concern raised by certain carriers is not that roaming prices are too high, but are *too low*, with some complaining that prices have reached "ridiculously low" levels.[10]

Five years ago, the Commission determined that its policy of relying on market forces was successful, noting that roaming had become "commonplace" and that roaming prices had "substantially declined."[11] Indeed, only one year ago it recognized that the roaming market has

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8 *Implementation of Section 322 of the Communications Act*, 12 FCC Rcd 9972, 9980 ¶ 22 (1997).

9 Rosston Economic Analysis at ¶ 16 and Figure 2.

10 *See* NTCA Comments, Docket No. 05-71, at 5 (March 28, 2005). .

11 *See 2000 Roaming NPRM*, 15 FCC Rcd 21628, 21633 ¶ 13 (2000).

become "increasingly competitive" as "roaming rates have continued to fall."[12] And, as Dr. Rosston explains, "since there is no market failure evident, it would be folly [for the FCC] to try to make a correction":

> The only likely beneficiaries of such a rule would be firms that have been hurt by competition. There is no evidence that any of the proposed rules would help consumers in any way. Indeed, these rules could paradoxically harm consumers by increasing costs and reducing investment incentives. While a mandatory roaming rule may be in the private interests of certain firms, the public interest demands that the Commission not interfere with efficient workings of a highly successful, competitive market.[13]

Those carriers proposing new rules have presented no facts that would justify the adoption of a new requirement.[14] To the contrary, earlier this year an association of rural carriers advised the Commission that roaming today is "nearly ubiquitously available to consumers" and roaming rates have fallen to "low levels"[15] – in other words, the market is working as it should.

II. ROAMING SERVICES ARE COMPETITIVE AND CONSUMERS, INCLUDING IN RURAL AREAS, HAVE BENEFITED ENORMOUSLY BY FCC RELIANCE ON MARKET FORCES

Sprint Nextel below discusses several major developments that have occurred since the Commission last examined roaming five years ago – all of which have benefited consumers and weigh against the imposition of a new, separate roaming rule.

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12 *See Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd 21522, 21588-89 ¶ 174 (2004).

13 Rosston Economic Analysis at ¶ 92.

14 The FCC is, therefore, correct in asking those carriers seeking new regulation to present facts that would justify the imposition of new requirements on the competitive wireless industry. *See 2005 Roaming NPRM* at ¶ 41.

15 NTCA Comments, Docket No. 05-71, at 4 and 5 (March 28, 2005).

A. Consumers Are Roaming Less Often Today Because of Continued Network Buildout and Expansion

Wireless customers today are required to roam less often than in the past because carriers have continued to expand their network footprint, with the result that more customer calls are "on-network." According to CTIA data, over the past five years, the number of cell sites has increased by 84 percent from 95,733 sites in June 2000 to over 178,000 sites in June 2005.[16] Some of these new sites were used for "fill in" coverage (*e.g.,* eliminate coverage "holes," provide additional capacity in high-usage areas). But a significant number of these sites were built to expand carrier footprints. Over the past five years alone, for example, Sprint Nextel and its affiliates expanded their CDMA networks to cover approximately 60 million additional people (POPs) – one-fifth of all Americans. Similarly, over the same period, coverage of the Sprint Nextel iDEN network has expanded to include approximately 55 million additional POPs.[17]

Network expansion is important to consumers in many ways. Residents in the area of expanded coverage enjoy a new, competitive facilities-based alternative. Customers of the carrier expanding its network have greater service throughout the country – access in areas in which they previously could not get service or on-network access – so they will no longer incur roaming charges when traveling to areas previously covered only by a roaming partner. Network expansion also benefits unaffiliated roamers. For example, if a market had been served by three carriers, the addition of a fourth carrier means that other carriers may enjoy an additional option for a roaming partner – and increased choice generally results in lower roaming prices.

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[16] *See* CTIA's Semi-Annual Wireless Survey, *available at* www.ctia.org/research_statistics/index.cfm/AID/10030.

[17] Sprint Nextel's iDEN coverage includes the network of its strategic affiliate, Nextel Partners, Inc.

B. Innovative Arrangements such as the Sprint Nextel Strategic Roaming Alliances Are Providing Increased Competition and Choice to Residents of Rural Areas

Competition is arriving in rural America and this new competition is benefiting consumers, both residents of and travelers to these rural areas.[18] And, market forces are developing innovative arrangements to provide additional competitors and advanced services to rural areas.

For example, over the past year, Sprint Nextel has begun executing strategic roaming alliances with several rural CDMA carriers that are committed to expanding the availability of advanced networks and services in rural areas. Current partners include:

- Nex-Tech Wireless, a newly formed company owned by incumbent rural LECs: Rural Telephone Service Company (Lenora, Kansas, with 12,000 access lines), Mutual Telephone Company (Little River, Kansas with 500 access lines) and Golden Belt Telephone Association (Rush Center, Kansas, with 6,600 lines). Nex-Tech is building a state-of-the-art CDMA network to serve 27 counties in central and western Kansas and another five counties in eastern Colorado. This area is very rural – with an average population density of less than seven persons per square mile.[19] Nex-Tech commenced full scale commercial service on October 15, 2005 with 90 cell sites,[20] it expects to activate another 30 sites before the end of the year,[21] and its "goal is to have a cell site in every town with 300 or more people."[22]
- Pioneer Partnership Group, a partnership of four rural carriers in Oklahoma and Kansas: KanOkla Telephone Association (Caldwell, OK, with 1,400 access lines); Pioneer Telephone Cooperative (Kingfisher, OK, with 54,000

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[18] *See Tenth Annual CMRS Competition Report*, WT Docket No. 05-71, FCC 05-173, at ¶ 94 (Sept. 30, 2005)("[W]e conclude that CMRS providers are competing effectively in rural areas.").

[19] *See* Nex-Tech Letter, WT Docket No. 05-63, at 2 (March 30, 2005)("Nex-Tech Wireless intends to deliver full, nearly ubiquitous, PCS coverage to a large 23,000 square mile area of rural newest Kansas, with a population base of only 152,000.").

[20] *See* Nex-Tech Wireless Press Release, *Nex-Tech Wireless Kicks Off Grand Opening Weekend* (Oct. 26, 2005), *available at* www.nex-techwireless.com/news.aspx; WIRELESS WEEK, *New Regional Players Jump into Wireless* (Nov. 14, 2005).

[21] *See id.*

[22] *See* Nex-Tech Wireless Press Release, *Nex-Tech Wireless Kicks Off Grand Opening Weekend* (Oct. 26, 2005), *available at* www.nex-techwireless.com/news.aspx.

lines); South Central Communications (Medicine Lodge, KS, with 2,000 lines); and Hinton Cellular Company (Hinton, OK).[23] Pioneer had been providing CDMA service in the northwest quadrant of Oklahoma with 71 sites. Under its agreement with Sprint Nextel, Pioneer will more than triple its coverage in western Oklahoma and southern Kansas by adding another 167 sites (for a total of 238 sites), serving a population of 350,000.[24]

- United Wireless Communications is a newly formed company owned by the rural LEC, United Telephone Association (Dodge City, KS, with 6,300 access lines). With its "new PCS network, United will offer competitive, state-of-the-art wireless voice and data services to its customers in southwest Kansas."[25]

These strategic roaming alliances benefit customers of both Sprint Nextel and its new partners. The alliances allow each carrier's customers to enjoy a full suite of services, including data and text messaging, while roaming on each other's networks. The alliances also provide other business and consumer benefits. United Wireless has advised the Commission that the revenues generated from Sprint Nextel roaming traffic will help fund construction of its new network.[26] And Nex-Tech's chief operating officer has described the benefits of its relationship with Sprint Nextel as follows:

> The partnership with Sprint PCS will allow all Nex-Tech Wireless customers to connect seamlessly with Sprint's national network and that of Sprint's partners and affiliates. . . . Not only will Nex-Tech Wireless offer superior service and a host of affordable local, regional and national rate plans, but through its partnership with Sprint, it will bring the latest in high-tech handsets and features.[27]

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23 Pioneer Press Release, *Pioneer Cellular Inks Strategic Roaming Alliance with Sprint* (Feb. 11, 2005), *available at* www.ptci.com/Main.php?do=lob_press&cat=C&lob=coopnews.

24 *See id.* at 2. *See also* Pioneer Press Release, *Pioneer Begins Expansion of Cellular Service* (July 6, 2005), *available at* www.ptci.com/Main.php?do=lob_press&cat=C&lob=coopnews&id=36; AMERICAN EXECUTIVE, *Corporate Spotlight – Pioneer Telephone* (June 2005), *available at* www.redcoatpublishing.com/spotlights/sl_06_05_Pioneer.asp.

25 United Wireless Letter, WT Docket No. 05-63, at 1 (April 1, 2005).

26 *See id.* at 2.

27 *See* Nex-Tech Wireless Press Release, *Nex-Tech Wireless Brings Jobs to Ellis County*, *available at* www.nex-techwireless.com/news.aspx.

The new investments these strategic partners are making in their networks are also benefiting their respective local economies. For example, Nex-Tech recently began construction of a new headquarters/call center; it has already hired 50 people and its annual payroll already exceeds $2 million.[28] Nex-Tech expects to double its payroll over the next 18 months.[29]

On its iDEN network, Sprint Nextel has had a long-standing relationship with Nextel Partners, which provides CMRS service to consumers in rural and tertiary markets. As a result, Sprint Nextel's and Nextel Partners' customers have broader coverage throughout the country and can seamlessly access the full suite of iDEN services. These iDEN services, moreover, are held to the same service quality standards and specifications of iDEN services provided on the Sprint Nextel network, thereby enhancing the customer experience while "off-network."

Residents of these rural areas clearly benefit by these strategic alliances and the new entry. Consumers enjoy an additional choice in service providers, and the new entrants will offer access to a state-of-the-art national network.[30] These CDMA entrants as well as Nextel Partners are also offering rural consumers advanced data features.[31] In turn, consumers in these rural areas benefit from this new investment and added competition.

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28 *See* Nex-Tech Wireless Press Release, *Nex-Tech Wireless Breaks Ground for New Headquarters* (Oct. 24, 2005), *available at* www.nex-techwireless.com/news.aspx; Nex-Tech Wireless Press Release, *Nex-Tech Wireless Launches Service* (Oct. 20, 2005), *available at* www.nex-techwireless.com/news.aspx.

29 *See id*.

30 For example, Nex-Tech is offering consumers in its extremely rural area for $39.99, 250 "anytime local" minutes (on Nex-Tech's network), 150 "anytime nationwide" minutes (on Sprint Nextel's CDMA network), 1,000 "night and weekend" minutes, and 1,000 mobile-to-mobile minutes. *See* www.nex-techwireless.com/Document.aspx?id=10.

31 Nex-Tech customers can send 10 text messages for no additional charge and can send an unlimited number of text messages for $9.99 monthly. They can obtain 2 Mbps of web access for no additional charge and unlimited web access for $49.99 monthly (with several other lower cost plans available). *See* www.nex-techwireless.com/Document.aspx?id=29.

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In summary, given the continued dramatic reduction in roaming prices and the continued buildout of competitive networks (which reduces the need for roaming), available evidence suggests there exists competition for roaming services and that American consumers, including those living in and traveling to rural areas, have benefited by the Commission's reliance on market forces.

III. AN INDIVIDUAL COMPETITOR'S LOSS OF ROAMING REVENUES IS NOT A REGULATORY CONCERN; IT IS A SIGN THAT COMPETITION IS WORKING

Some rural carriers, such as Sprint Nextel's alliance partners, and their customers are benefiting from new roaming arrangements while other carriers complain that roaming revenues are declining precipitously.[32] However, an individual carrier's loss of revenues does not raise a regulatory concern. Rather, as Dr. Rosston explains, "reduced roaming traffic and revenue on specific networks is a sign that competition is working":

> If rural firms are losing roaming revenues, however, it is primarily because other carriers now have competitive alternatives that did not exist in the past. . . . While this outcome may not be good for the rural carrier, it is good for consumers. This is the nature of competition.[33]

Roaming has fundamentally changed in recent years because, with the continued construction of CMRS networks and the resulting precipitous fall in prices, roaming is no longer the "very lucrative" business it once was.[34]

Again, the fundamental changes in the market that affect historic roaming revenue streams reflect changes resulting from increased competition:

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32 *See 2005 Roaming NPRM* at ¶ 39.

33 Rosston Economic Analysis at ¶¶ 47, 85.

34 *See Fourth Annual CMRS Competition Report*, 14 FCC Rcd 10145, 10167 (1999).

- Additional carriers are expanding their networks to rural areas;[35]
- With more providers in rural markets, carriers are using the roaming services of the competitor offering a lower price;[36]
- Carriers seek to drive roaming prices "down to as low a level as possible" so as to provide the best value to their customers (and remain competitive).[37]

In other words, while some rural incumbents complain that the roaming market has become <u>*too competitive*</u> – the market developments they identify in fact *benefit consumers*.

Carriers are responding in different ways to the fundamental change occurring with regard to roaming services. UBS Investment Research notes that some carriers are increasing their capital budget to add more cell sites and therefore make themselves more attractive roaming partners,[38] as evidenced by the Sprint Nextel strategic alliance partners. Similarly, Western Wireless (now Alltel) and Rural Cellular have deployed overlay CDMA and GSM networks to increase their potential roaming partner customer base.[39]

As another example of carrier response to changing dynamics, Dobson Cellular Systems has advised the Commission that it foresaw "some time ago that competitive pressures in rural markets could drive down the roaming revenues it might enjoy from other carriers."[40] It there-

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35 *See, e.g.* RTG Petition, Docket No. 00-193, at 6 (Nov. 1, 2004); PSComm Comments, Docket No. 05-71, at 8 and 9 (March 28, 2005).

36 *See, e.g.*, Great Lakes Comments, Docket No. 05-71, at 5 (March 28, 2005); Leaco Comments, Docket No. 05-71, at 5 (March 28, 2005).

37 *See, e.g.*, Great Lakes Comments, Docket No. 05-71, at 4 (March 28, 2005); Leaco Comments, Docket No. 05-71, at 5 (March 28, 2005). *See also* NTCA Comments, Docket No. 05-71, at 5 (March 28, 2005)(Large carriers are demanding that small carriers accept "artificially low" and "ridiculously low roaming rates.").

38 *See* UBS Investment Research, *US Wireless 411*, at 33 (July 14, 2005).

39 *See* RCR WIRELESS NEWS, *Alltel Could Be Wireless Wal-Mart*, at 1 (Jun. 17, 2005); RCR WIRELESS NEWS, *Alltel Taking Time to Integrate Western Assets*, at 3 (Sept. 12, 2005).

40 Dobson Reply Comments, Docket No. 05-71, at 6 (April 12, 2005). Between 2000 and 2004, Dobson's roaming revenues as a percent of total operating revenues fell from 45% to 20%.

fore began upgrading and expanding its network to "move away from a dependence on roaming revenues" and provide "advanced wireless services that would increase Dobson's local market penetration and provide higher-per-local-subscriber revenues."[41] Such network investment also makes Dobson "an attractive roaming alternative for the national carriers."[42] In turn, Dobson's capital investment has apparently paid business dividends, as its roaming revenues this year have jumped by over 20 percent even though its average roaming yield (revenue per minute) dropped by over two cents.[43]

By contrast, some carriers have ignored these market developments choosing to conduct "business as usual" rather than adopt innovative changes to make their networks more attractive to potential roaming partners. As Dobson has correctly observed, "business models based on extracting high roaming rates from carriers (who must then pass them on to the roaming public) are no longer viable":

> [T]he problem facing the Rural Commenters is not a lack of competition, but rather their failure to respond effectively to the competitive landscape that demands capital investment to upgrade networks to state-of-the-art technologies.[44]

The Commission should not pick winners and losers in a given area,[45] and there is no reason that it should compel a carrier to use particular roaming services if it is not in the best inter-

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Compare Sixth Annual CMRS Competition Report, 16 FCC Rcd 10145, 10167 (2001), *with* Dobson Reply Comments at 7.

41 Dobson Reply Comments at 6-7.

42 *Id.* at 7. *See also id.* ("To the extent that Dobson's investment in its home markets makes it a more attractive candidate for a favorable roaming arrangement, it is Dobson's response to the competitive CMRS marketplace that has driven these results.").

43 *See* RCR WIRELESS, *Dobson Boosts Revenues, Inks New Cingular Roaming Deal*, at 5 (Aug. 22, 2005); RCR WIRELESS, *Dobson, Cingular Ink New Roaming Deal*, at 1 (Aug. 8, 2005).

44 Dobson Reply Comments, Docket No. 05-71, at 6 and 10 (April 12, 2005).

est of its customers. The important question in evaluating roaming services is the effects on "consumers of mobile telephony services, not on particular mobile telephony carriers *per se*":

> We distinguish such harm to consumers from effects on mobile telephony carriers such as a reduction in the roaming revenues of one or more of Cingular's roaming partners as a result of the merger.[46]

As a matter of regulatory policy, the loss of carrier roaming revenue under these circumstances is, in fact, a sign that competition is working and consumers are benefiting.[47]

IV. THERE IS NO EVIDENCE OF A MARKET FAILURE REGARDING ACCESS TO ROAMING SERVICES

Some carriers have expressed concern over their continued ability to execute roaming contracts. The concern is *not* that they are unable to reach roaming agreements today but that nationwide carriers "will be able . . . to adversely affect roaming negotiations *in the future*."[48] This concern lacks merit, as Sprint Nextel demonstrates below.

A. Recent Industry Consolidation Has Benefited Consumers

There is no basis to the claim that roaming options have been "significantly reduced" as a result of recent industry consolidations.[49] To be sure, the AT&T Wireless/Cingular merger re-

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45 *See First Section 706 Report*, 14 FCC Rcd 2398, 2401 ¶ 5 (1999)("Our role is not to pick winners and losers, or to select the best technology to meet consumer demand. We intend to rely as much as possible on free markets and private enterprise.").

46 *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd at 21588 ¶ 172, 21591 ¶ 180. *See also MCI/British Telecom Merger Order*, 12 FCC Rcd 15361, 15410 ¶ 154 (1997)("[A] reduction in the profits of rivals without an adverse effect on consumers constitutes harm to competitors, but not necessarily harm to competition.").

47 Besides, as Dr. Rosston explains, if the FCC believes that an incumbent's loss of revenues does raise a regulatory issue, it should address the matter directly and "not distort the market by instituting a roaming rule." Rosston Economic Analysis at ¶ 84.

48 *2005 Roaming NPRM* at ¶ 38 (emphasis added)

49 *Id*. *See also* NTCA Comments, Docket No. 05-71, at 5 (March 28, 2005)("Consolidation is "threat[ing] the viability of small carriers who serve rural America."); Great Lakes Comments, Docket No. 05-71, at 2 (March 28, 2005)(Mergers have created "significantly fewer nationwide

duced the number of national GSM carriers from three to two. But the Commission examined this merger proposal and concluded that the merger would "not adversely affect the availability of roaming services or raise roaming rates passed through to customers."[50]

There has, moreover, been no material change in the roaming possibilities for CDMA carriers. There were two national CDMA carriers in 2000, and there remain two national CDMA carriers in 2005.[51] Similarly, there was one nationwide iDEN carrier in 2000, and there remains one today. The Sprint-Nextel merger had no effect on potential roaming partners.[52] In addition, the Alltel-Western merger largely involved non-overlapping geographic markets, and the Commission noted this merger, if anything, would increase smaller carrier options because the merged firm may serve "as an effective substitute to the national firms."[53]

In fact, the Commission has recognized that the recent mergers would benefit consumers because customers would be required to roam less often: "Alltel's merger with WWC would reduce its roaming costs in geographic markets where Alltel and WWC's service areas do not

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roaming partners."); RTG Ex Parte Letter, Docket No. 00-193, at 1 (June 28, 2005)("[R]ecent wireless industry consolidation had resulted in limited roaming partner options for small, rural carriers."); Leaco Rural Telephone Cooperative, Docket No. 05-71, at 3 (March 28, 2005)("CMRS industry mergers create significantly fewer nationwide roaming options for Leaco.").

50 *AT&T Wireless-Cingular Merger Order,* 19 FCC Rcd at 21588 ¶ 173.

51 Some smaller carriers have characterized the new Alltel-Western firm as a national carrier, in which case there would be three national CDMA carriers. *See, e.g.,* RCA Ex Parte Letter, Docket No. 05-50, at 2 (April 5, 2005); *Alltel-Western Wireless Merger Order* at ¶ 105.

52 *See Sprint-Nextel Merger Order,* WT Docket No. 05-63, FCC 05-158, at ¶ 126 (Aug. 8, 2005)(The merger will "not reduce the number of iDEN or CDMA nationwide roaming partners for smaller, rural, and/or regional providers."); *id.* at ¶ 35 ("[T]he merger will not adversely affect competition in the market for roaming services or raise rates that would be passed through to consumers.").

53 *See Sprint-Nextel Merger Order* at ¶ 104.

overlap, and the elimination of roaming agreements in these markets would *directly benefit those of its customers who would no longer be charged to roam in those areas*."[54]

Nor is there any basis to the assertion that small carriers have "minimal" roaming partner options.[55] The Commission recently determined that metropolitan areas, which represent the primary roaming areas for rural carriers, average 5.5 competitors.[56] In contrast, for metropolitan carriers, the pool of potential roaming partners in rural areas is only 3.7 carriers.[57] As a general proposition, then, rural carriers have more roaming options – not fewer – compared to metropolitan carriers, even if potential roaming partners are limited to particular air interfaces.

B. Asymmetrical Pricing Is Consistent with Competitive Markets

Some carriers also complain that other carriers are demanding asymmetric roaming rates.[58] However, asymmetrical pricing does not suggest a market failure. Rather, as Dr. Rosston explains, asymmetric pricing between carriers of different sizes and serving different regions is "consistent with the smooth workings of the market and appropriate responses to market incentives":

> [T]he simple analogy is that different products and services have different value. Because the supply and demand for roaming services differ in different areas, one should expect different prices in different areas. Prices for identical houses, food, and services differ in different geographic areas. Roaming service is no different.[59]

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[54] *Alltel/Western Merger Order*, 20 FCC Rcd 13053 at ¶ 151 (2005)(emphasis added). *See also AT&T Wireless/Cingular Merger Order*, 19 FCC Rcd at 21610 ¶ 233; *Sprint/Nextel Merger Order*, 20 FCC Rcd 13967 at ¶ 124.

[55] *See* RTG Ex Parte Letter, WT Docket No. 00-193, at 1 (June 28, 2005).

[56] *See Tenth Annual CMRS Report* at ¶ 94.

[57] *See id.*

[58] *See 2005 Roaming NPRM* at ¶¶ 17, 40.

[59] Rosston Economic Analysis at ¶¶ 63-64.

Not all areas of the country are equal, and the Commission's spectrum auctions confirm that some areas are more valuable than others, even on a per-POP basis. For example, in the most recent PCS auction (No. 58), the 10 licenses with the highest $/MHz-POP bids all had populations over one million. In contrast, the 24 licenses that received no bids in the auction all had populations below 610,000 – and most were below 100,000 people. As Dr. Rosston explains:

> It would be sensible, then, if firms were not only willing to pay more for operating licenses in these regions but also if firms were willing to pay more to allow their customers to roam in these areas.[60]

The value of roaming on a network covering one million POPs is not the same as the value as roaming on a network covering 250 million POPs. Again, as Dr. Rosston notes, "access to a small network or to a carrier in an area where other carriers also offer roaming may not be especially valuable":

> A carrier owning such a network may therefore be unable to charge a high price for roaming because the other carrier may be able to negotiate with other carriers, build its own facilities, or even do without access in the area. On the other hand, access to a vast nationwide network on which the operator has spent billions of dollars might be very valuable. A carrier offering a small network and a carrier offering a national network may indeed enter into a roaming agreement, but there is no particular economic reason to believe that roaming rates should be symmetric.[61]

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In the end, certain small carriers want the Commission to carve out special treatment for them – first, forcing a roaming relationship where the market may not justify it; and second, re-

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60 *Id.* at ¶ 55.

61 *Id.* at ¶ 54.

quiring below market rate pricing from their competitors.[62] However, as a matter of law, the Commission does not have the flexibility to preserve the viability of any individual competitor, small or large; its "statutory duty is to protect efficient competition, not competitors."[63] Specifically, the Commission is "not at liberty to subordinate the public interest to the interest of equalizing competition among competitors":[64]

> As we have said on many occasions, it is not this Commission's obligation to equalize competitive differences between licensees in the same market.[65]

"While it is understandable that small carriers, like everyone else, would like lower prices, there is no economic reason why a negotiation between a firm with national coverage and a large subscriber base and a firm with limited coverage and few subscribers would yield the same result":

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[62] *See, e.g.,* RCA *Ex Parte* Letter, Docket No. 05-50, at 3 (April 5, 2005)(Claiming FCC has the obligation "preserv[e] the viability of small carriers.").

[63] *Bell Atlantic Mobile/NYNEX Mobile Merger Order*, 12 FCC Rcd 22280, 22288 ¶ 16 (1997). *See also Alascom/AT&T Merger Order*, 11 FCC Rcd 732, 768 ¶ 56 (1996)("[T]he Commission's statutory responsibility is to protect competition, not competitors."); *California CMRS Rate Request Denial Order*, 10 FCC Rcd 7486, 7517 ¶ 62 (1995)(Section 332 "protects customers, not competitor inefficiencies.); *First Access Charge Reform Order*, 12 FCC Rcd 15982, 16059 ¶ 180 (1997)("[O]ur rules should promote competition, not protect certain competitors."); *Telesis/SBC Merger Order*, 12 FCC Rcd 2624, 2647 ¶ 48 (1997)("Our priority is to promote efficient competition, not to protect competitors."); *Motorola/Nextel Merger Order*, 10 FCC Rcd 7783, 7787 ¶ 20 (1995)("We agree with Nextel that our priority is to protect competition, not competitors, for the benefit of consumers.").

[64] *800 MHz Rebanding Reconsideration Order,* WT Docket No. 02-55, FCC 05-174, at ¶ 73 (Oct. 5, 2005), *quoting SBC* v. *FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995). *See also Hawaiian Telephone* v. *FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974)(FCC did not conform to the public interest mandate in approving applications where it considered the factor of "competition, not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors."); *Western Union* v. *FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("[E]qualization of competition is not itself a sufficient basis for Commission action.").

[65] *ICS Communications*, File No. 23865-CD-P-(2)-83, at ¶ 6 (Sept. 5, 1985). *See also McCaw/AT&T Transfer Reconsideration Order,* 10 FCC Rcd 11786, 11792-93 ¶ 9 (1996) ("[T]he Communications Act requires us to focus on competition that benefits the public interest, not on equalizing competition among competitors."); *McCaw/AT&T Transfer Order*, 9 FCC Rcd 5836, 5858 ¶ 32 (1994)"[T]he Communications Act does not require parity between competitors as a general principle.").

> There is no market failure identified here – the only problem appears to be that the smaller carriers think that it is cheaper to get special treatment and roaming agreements from the Commission than by providing valuable services and paying for valuable services in the marketplace.[66]

Government intervention into markets should be limited to instances of demonstrated market failure, and the Commission's long-standing complaint remedy gives every carrier, large or small, a forum to raise concerns about conduct they believe to be unreasonable. Accordingly, there is no basis to impose new rules that would distort the normal operation of market forces.

V. THERE IS NO BASIS IN LAW OR POLICY TO REQUIRE COMPETITORS TO ASSIST EACH OTHER

The Commission asks for comment on the wisdom of adopting an "anti-discrimination rule," whereby wireless carriers would be required in certain circumstances to deal with each other – including their direct competitors.[67] Adoption of such a rule in the highly competitive wireless marketplace would be unprecedented and wholly unjustified, in both law and economic policy.

It is a long-standing principle of American jurisprudence and economic theory that as a general matter, there is "no duty to aid competitors."[68] As the Supreme Court has held, a business "of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."[69] In this regard, courts have held that even "a firm with lawful monopoly power has no general duty to help its competitors":

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66 Rosston Economic Analysis at ¶¶ 79, 90.

67 *See 2005 Roaming NPRM* at ¶¶ 28 and 33.

68 *Verizon* v. *Trinko*, 540 U.S. 398, 411 (2004).

69 *Monsanto* v. *Spray-Rite*, 465 U.S. 752, 761 (1984). *See also U.S.* v. *Colgate*, 250 U.S. 300, 307 (1919)("In the absence of any purpose to create or maintain a monopoly, the Sherman act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he

> [T]here is no more duty to give or continue such assistance [to a competitor] than there is to lend money to a competitor. . . . [C]learly a firm . . . is not required to lend money to a competitor merely because the loan would increase competition.[70]

Antitrust courts have imposed a duty to deal only in the narrow circumstance where a monopolist controls an essential (or "bottleneck") facility.[71] Obviously, no wireless carrier possesses a monopoly;[72] to the contrary, the Commission recently concluded that competition in the wireless market is "robust" and that no wireless carrier possesses "a dominant share of the market."[73] In addition, both the Commission and appellate courts long ago rejected the assertion that any individual wireless carrier controls a "bottleneck facility."[74]

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will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."); *Aspen Skiing Co*. v. *Aspen Highlands Skiing Corp*., 472 U.S. 585, 600-01 (1985)("The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and associates.").

70 *Olympia Equipment Leasing* v. *Western Union,* 797 F.2d 370, 375. 377 (7th Cir.), *reh. denied en banc,* 802 F.2d 217 (7th Cir. 1986), *cert. denied,* 480 U.S. 934 (1987).

71 *See, e.g., MCI* v. *AT&T,* 708 F.2d 1081, 1132-33 (7th Cir. 1983).

72 *See, e.g., Metro Mobile* v. *NewVector Communications,* 661 F. Supp. 1504 (E.D. Az. 1987), *aff'd,* 892 F.2d 62 (9th Cir. 1987)(cellular carrier does not possess monopoly power in the wholesale market even in the old head start days when the wireline cellular affiliate controlled 100 percent market share).

73 *See Tenth Annual CMRS Competition Report* at ¶¶ 2, 204. There is, therefore, utterly no basis to the unsupported assertion that national carriers "dominate the market" and possess "market power." *See* RTG Ex Parte Letter, WT Docket No. 01-193, at 1 (June 28, 2005). Besides, it is difficult to understand how certain rural carriers can claim that non-rural carriers have market power when the FCC's own data shows a higher level of market concentration in rural areas compared to metropolitan areas. *See Tenth Report* at Appendix A, Table 3.

74 *See SBC* v. *FCC,* 56 F.3d 1474, 1491 (D.C. Cir. 1995)("[T]here is no 'mobile bottleneck' parallel to the 'landline bottleneck.'"); *Second CMRS Order,* 9 FCC Rcd 1411, 1499 ¶ 237 (1994)("CMRS providers do not have control over bottleneck facilities."); *CMRS Interconnection Obligations,* 9 FCC Rcd 5408, 5460 ¶ 124 (2994)(same); *Second CMRS Reconsideration Order,* 11 FCC Rcd 19729,19731 ¶ 4 (1996)(same).

Intercarrier roaming, at its core, involves facility sharing. Specifically, one carrier wants access to another's network so as to offer its customers a larger service footprint and, in the process, improve its position in the market relative to its competitors – including in the case of direct competitors, improve its position relative to the very provider being asked to share its network. Congress, however, has determined that in the telecommunications market, only large incumbent LECs with bottleneck control and significant market power should have a duty to deal and share their network with competitors – and then only in limited circumstances.[75] Congress imposed no such similar duty on competitive wireless carriers, who have invested billions of dollars in their networks with no ILEC-like revenue guarantees, and the FCC has consistently declined to require competitive wireless carriers to share their networks with each other.[76]

Nor would a mandatory roaming (or facilities-sharing) rule be consistent with sound economic and public policy. The public interest – namely, consumer welfare – is served by robust competition, because such competition forces individual providers continually to improve upon the value they provide to consumers – whether lower prices, a bigger service footprint, improved quality of service, *etc.* The "ability to exclude competitors from the fruits of one's investment," Dr. Rosston observes, "is an important part of the competitive marketplace":

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75 *See* 47 U.S.C. § 251(c). Unlike incumbent LECs that made their network investments in a monopoly environment with revenue guarantees, wireless carriers made their investments in a competitive environment. For the FCC to now reverse course and compel wireless carriers to share their networks with competitors would undermine their past investments and cause considerable uncertainty in the investment community to fund additional investments in the future.

76 *See, e.g., CMRS Interconnection Reconsideration Order*, 16 FCC Rcd 10009 ¶ 1 (2001) ("[F]acilities-based commercial mobile radio service (CMRS) providers are not required to interconnect with resellers' switches."). The FCC did at one time require wireless carriers to permit the resale of their services, but it determined that this requirement should sunset when the market became more competitive. The result of this rule's sunset and the FCC's reliance on market forces: resale activity has flourished with the proliferation of MVNOs.

> Without such an ability, firms would have incentives to wait for their rivals to invest and then to mimic the services (and to free ride on the investment risk). Not only is this an important piece of the competitive process, it is not a very controversial point in the context of a competitive market like wireless communications.[77]

Wireless carriers compete on many variables, and one of these variables is the size of one's footprint or coverage area. If one carrier has a smaller footprint than its competitor, that carrier necessarily must offer consumers better value with respect to the other variables of competition (*e.g.,* rates, service quality, customer service). This competitive strength, in turn, will compel the competitor with the larger footprint to improve its own services in these areas. Consumers thus benefit when competition is extended to as many variables as possible.

Conversely, a government requirement that a carrier with a larger footprint share its network with its competitor would reduce competition and eliminate consumer choice. Consumer welfare would be harmed because a roaming rule would eliminate coverage area as a basis for competition. The public interest would be harmed because a carrier with access to its competitor's network may have little incentive to expand the scope of its own network to remain competitive with the provider that took the risk in building out in more costly areas. As Dr. Rosston explains, a duty to deal may not only "deter investment, but, in some circumstances, also lead to non-economic investment."[78]

A carrier should be able to refuse to deal not only with its competitors, but also with the competitors of its affiliates.[79] Affiliations, the Commission has noted, create "a 'family' of operating companies with much closer relationships than those formed by traditional roaming

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77 Rosston Economic Analysis at ¶ 43.

78 *Id.* at ¶ 70. *See also id.* at ¶¶ 40-43.

79 *See 2005 Roaming NPRM* at ¶ 36 (FCC asks whether licensees may offer better roaming terms to affiliates than non-affiliates).

agreements."[80] Central components of affiliations are that affiliates serve different (typically, less populated) markets than the licensee, they often operate under a common brand and specified technology/service standards, the affiliate may use the licensee's spectrum, and the parties agree to be each other's preferred roaming partner. As a practical matter, assisting a competitor of an affiliate is assisting a direct competitor.

The same analysis applies to a licensee's strategic roaming partners. As discussed above, Sprint Nextel has had long-standing strategic roaming affiliations and is continuing to form additional strategic alliances with various rural carriers in order to ensure the availability of advanced network coverage in unserved or underserved rural areas.[81] A government requirement that Sprint Nextel now assist all of its partners' competitors would undermine the very investment Sprint Nextel has made in these partners and would distort the very competition that the Commission has been committed to promote.

VI. CONCLUSION

The Commission got it right a decade ago: "Market forces – not regulation – should shape the developing CMRS marketplace":[82]

> Success in the [CMRS] marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs – and not by strategies in the regulatory arena.[83]

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80 *See Tenth Annual CMRS Competition Report* at ¶ 63.

81 *See* Part II.B *infra.*

82 *Implementation of Section 322 of the Communications Act*, 12 FCC Rcd 9972, 9980 ¶ 22 (1997).

83 *Second CMRS Order*, 9 FCC Rcd 1411, 1420 ¶ 19 (1994). *See also Elimination of Market Entry Barriers*, 11 FCC Rcd 21381, 21833 ¶ 2 (1996)("The Commission believes that its CMRS rules should permit licensees to respond to market forces and demands, thereby permitting and promoting the operation of competitive market forces.").

The available evidence demonstrates that consumers throughout the nation, including in rural areas, have benefited by the Commission's reliance on market forces. The FCC should not promulgate roaming rules.

For the foregoing reasons, Sprint Nextel respectfully requests that the Commission take actions consistent with the views stated above.

Respectfully submitted,

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